



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-H-N-, INC.

DATE: JULY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an operator of hospitals and other medical facilities, seeks to employ the Beneficiary as a pulmonary/critical care physician. It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. organization to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master’s degree, or a bachelor’s degree and five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate that the Beneficiary met all the position’s requirements by the petition’s priority date.

On appeal, the Petitioner contends that the Director erred because the position did not require the Beneficiary to satisfy certain criteria until after the priority date.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. REQUIREMENTS OF THE OFFERED POSITION

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority of setting the *content* of the labor certification") (emphasis in original).

Here, the petition's priority date is January 18, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The labor certification states the minimum requirements of the offered position of pulmonary/critical care physician as a U.S. doctorate of medicine or osteopathic medicine, or a foreign equivalent degree, plus six years of training in internal medicine, and in critical care and pulmonary medicine. Part H.14 of the labor certification, "Specific skills or other requirements," specifies that the training must include completion of a three-year residency in internal medicine and, "by July 1, 2018," a three-year fellowship in pulmonary and critical care medicine. Part H.14 also states that the position requires a current and valid Indiana physician's license and, "by July 1, 2018," board certification or certification eligibility in pulmonary disease and critical care medicine.¹

The Petitioner demonstrated that, by the petition's priority date, the Beneficiary: obtained the foreign equivalent of a U.S. doctorate of medicine; completed a three-year residency in internal medicine; and had an Indiana physician's license and ABIM certification in pulmonary disease. The Petitioner also submitted evidence that, on June 30, 2018, the Beneficiary completed a three-year fellowship in pulmonary and critical care medicine, qualifying him to apply for board certification in critical care medicine.

The Beneficiary did not complete the requisite fellowship or qualify for board certification in critical care medicine by the petition's priority date. The Director therefore concluded that, contrary to the holding in *Wing's Tea House*, the Petitioner did not demonstrate the Beneficiary's qualifications for the offered position by the petition's priority date.

On appeal, the Petitioner argues that, as the labor certification specifies, the job offer did not require the Beneficiary to complete the fellowship or to qualify for certification until July 1, 2018. The Petitioner states that "there is no prohibition on future requirements." The Petitioner also argues that, by considering applicants in the final stages of training, it offered the position to "all potentially

¹ The certification/certification eligibility requirement appears to refer to the American Board of Internal Medicine (ABIM) and the American Board of Emergency Medicine. The record does not specify whether the position requires separate or dual certifications in pulmonary and critical care medicines. *See* ABIM, "Critical Care Medicine Policies," <https://www.abim.org/certification/policies/internal-medicine-subspecialty-policies/critical-care-medicine.aspx> (last visited June 27, 2019).

qualified candidates.” It asserts that USCIS “has consistently and routinely acknowledged and approved this practice.”

The Petitioner, however, does not cite examples of USCIS’ acknowledgement or approval of such “future requirements,” nor were we able to find any. Moreover, visas are available to only “qualified immigrants who are members of the professions holding advanced degrees or their equivalent.” Section 203(b)(2)(A) of the Act (emphasis added). The Act therefore indicates that a foreign national must first meet a position’s requirements before obtaining a priority date, or place in line for an immigrant visa. In addition, the holding in *Wing’s Tea House* forecloses the Petitioner’s argument. See 8 C.F.R. § 103.10(b) (requiring all Department of Homeland Security officers and employees to follow decisions designated as precedents). There, the former Immigration and Naturalization Service (INS) denied a restaurant’s petition for the position of foreign foods specialty cook, concluding that the beneficiary did not gain the requisite one year of experience stated on the accompanying labor certification until after the petition’s priority date. *Matter of Wing’s Tea House*, 16 I&N Dec. at 158-59. In affirming the decision, the Acting Regional Commissioner noted that, by regulation, the petition’s priority date constituted the date DOL accepted the labor certification application. *Id.* at 159-60. He also declined to depart from case law barring consideration of qualifications that a beneficiary gained after a petition’s priority date. *Id.* at 160 (citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971)). The Acting Regional Commissioner reasoned that, otherwise, “the beneficiary would receive a preferred priority date at a point in time when he is not qualified to perform the duties sought by the petition.” *Id.*

More than 42 years have passed since the Acting Regional Commissioner decided *Wing’s Tea House*. But DOL’s date of acceptance of an accompanying labor certification application still marks a petition’s priority date. See 8 C.F.R. § 204.5(d). Also, *Katigbak* and *Wing’s Tea House* remain valid law, still barring consideration of qualifications gained after petition priority dates. On this labor certification, the Petitioner specified that the job did not require completion of the fellowship and certification eligibility until after the petition’s priority date. In its written appeal brief, however, the Petitioner states that it required completion of those criteria by July 1, 2018, “to ensure the candidate had completed those requirements by the start of employment.” Thus, the record indicates that, to perform the job duties of the offered position, the Beneficiary had to complete the fellowship and attain certification eligibility. By the petition’s priority date, he had met neither requirement. Under *Wing’s Tea House*, we cannot allow the Beneficiary to “receive a preferred priority date at a point in time when he [was] not qualified to perform the duties sought by the petition.” We will therefore deny the petition.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner’s ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition’s priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of pulmonary/critical care physician as \$256,526 to \$450,000 a year. As previously indicated, the petition's priority date is January 18, 2018.

The Petitioner submitted copies of audited financial statements for 2016 and 2017. As of the appeal's filing, however, required evidence of its ability to pay the proffered wage in 2018, the year of the petition's priority date, was not yet available. Contrary to 8 C.F.R. § 204.5(g)(2), the record therefore does not establish the Petitioner's ability to pay from the petition's priority date onward. In any future filings in this matter, the Petitioner must therefore submit copies of an annual report, federal tax return, or audited financial statements for 2018.

Also, USCIS records indicate the Petitioner's filing of multiple immigrant petitions. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and other petitions that were pending or approved as of this petition's priority date, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).²

USCIS records indicate the Petitioner's filing of at least 10 petitions for other beneficiaries that were approved as of this petition's priority date of January 18, 2018.³ In any future filings in this matter, the Petitioner must provide the proffered wages and priority dates of the other petitions. It may also submit additional evidence of its ability to pay the combined proffered wages of the petitions. Evidence may include proof of its payment of wages to applicable beneficiaries in 2018 and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

IV. CONCLUSION

Contrary to precedent case law, the Petitioner did not demonstrate the Beneficiary's qualifications to perform the duties of the offered position by the petition's priority date. We will therefore affirm the petition's denial. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act; 8 U.S.C. 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-H-N-, Inc.*, ID# 3677410 (AAO July 30, 2019)

² The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or, unless an appeal remains pending, that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions or after their corresponding beneficiaries obtained lawful permanent residence.

³ USCIS records identify the other petitions by the following receipt numbers:

	and				